MBF LEASING SDN BHD

v.

ENG POH HONG

HIGH COURT MALAYA, KUALA LUMPUR
ZULKEFLI AHMAD MAKINUDIN J
[CIVIL SUIT NO: D3-22-3155-98 & D3-22-3156-98]
11 MAY 2004

CONTRACT: *Breach - Specific performance - Put option agreement - Whether a valid and enforceable contract - Whether specific performance a stipulation in terms of agreement - Whether plaintiff entitled to specific performance as it was seeking monetary compensation - Estoppel - Doctrine of estoppel - Whether applicable*

The plaintiff and the defendant entered into a put option agreement ('the agreement') pertaining to 550,000 shares in United Chemical Industries Berhad ("UCI"). The defendant had promised to buy all the option shares at the price of RM8,852,250 when the plaintiff exercises the option. The option period was from 1 November 1997 to 2 May 1998. On 24 April 1998, the plaintiff issued the completion notice. However, the defendant failed to pay the put option purchase price. Thus, the plaintiff claimed specific performance of the put option agreement. The defendant contended that the plaintiff was not entitled to specific performance of the agreement due to the fact that a letter was sent on 14 July 1998 deeming that the agreement was terminated if the defendant failed to comply with the completion notice within five days of the receipt of the letter. The defendant also claimed that the plaintiff did not have a right to specific performance as it was seeking monetary compensation.

Held (allowing plaintiff's claim):

[1] The agreement was freely entered into and the terms of the contract, the objective of the contract and the intention of the parties were clear. It was a valid and enforceable contract and it was signed by both parties. Specific performance was provided for and set out in the contract. In *lieu* of specific performance, an alternative remedy was provided for in the form of the sale of the shares in the open market and for the defendant to bear the shortfall. Evidence showed that the plaintiff had successfully issued the completion notice and delivered it to the defendant's correct address. The defendant had made several attempts to settle the share purchase price in accordance with the terms of the put option agreement and both parties

were negotiating the settlement. The parties' actions clearly showed that they had treated the agreement as subsisting and not terminated. The defendant should be estopped from now claiming that the plaintiff was debarred from claiming specific performance of the agreement when the defendant himself had treated it as valid and ongoing. (pp 480 d, i & 481 a-b)

[2] The plaintiff was not merely seeking to specifically enforce the payment of the contract sum but rather to specifically enforce the contract *ie*, for the defendant to complete the sale and purchase of the option shares for the price as stipulated in the agreement. The plaintiff is entitled to specific performance of the contract as stipulated by the terms of the put option agreement and should not be prevented from claiming the same merely because the enforcement of the contract amounted to a payment of money. (p 481 f-g)

[Plaintiff's claim allowed with costs; judgment entered against defendant.]

Case(s) referred to:

Arab Malaysia Corp Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd [1998] 6 MLJ 136 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Johnson v. Agnew [1997] 1 All ER 883 ***(refd)***

Lim Ah Moi v. AMS Periasamy Suppiah Pillay [1997] 3 CLJ 629 CA ***(dist)***

Vine v. National Dock Labor Board [1956] 1 All ER 1 ***(dist)***

Legislation referred to:

Evidence Act 1950, ss. 91, 92, 94, 114(g)

Specific Relief Act 1950, s. 18

For the plaintiff - Kenneth St James (ML Mak); M/s Michael Chai & Co
For the defendant - CW Leong; M/s Tee, Tan & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Zulkefli Ahmad Makinudin J:

Introduction

Both the plaintiff and the defendant have agreed at the commencement of the trial that the two cases of D3-22-3155-98 and D3-22-3156-98 will be heard together. The case of D3-22-3155-98 is taken as the case that would be heard and reference would be made to the documents and evidence in that case. It was also agreed by the parties that the decision/judgment in the case of D3-22-3155-98 would bind the case of D3-22-3156-98 as well, subject to the "subject matter" of both the cases.

The Facts Of The Case

The following are the relevant facts relating to the subject matter of the Put Option Agreement in the case of D3-22-3155-98 and the Put Option Agreement in the case of D3-22-3156-98 signed by the parties:

	D3-22-3155-98	D3-22-3156-98
Date of Agreement	1 November 1997	13 August 1997
Option Shares (UCI Shares)	550,000	612,000
Put Option Purchase Price	RM8,852,250	RM5,559,000
Price per share	RM16.095	RM9.083
Put Option Period expires	2 May 1998	9 February 1998
Completion Notice date	29 April 1998	9 February 1998

The Plaintiff's Claim

The plaintiff's claims are as follows:

(1) The plaintiff and the defendant entered into a Put Option Agreement dated 1 November 1997.

(2) The Option given pertains to 550,000 shares in United Chemical Industries Berhad ("UCI").

(3) The defendant promised to buy all the Option Shares at the price of RM8,852,250 when the option is exercised by the plaintiff.

(4) The Option Period was from 1 November 1997 to 2 May 1998.

(5) The plaintiff issued the Completion Notice dated 29 April 1998.

(6) The defendant failed to pay the Put Option Purchase Price of RM8,852,250.

(7) The plaintiff claims:

(a) Specific performance of the Put Option Agreement.

(b) Alternatively, an Order that the plaintiff sells the Option Shares and the defendant is to pay the shortfall consequential from the sale.

(c) In the further alternative, in the event that the plaintiff had already sold the Option Shares, an Order that the defendant pays the shortfall. (As the plaintiff has yet to sell the shares, this 3rd prayer is not applicable now).

The Defence

The defence of the defendant *inter alia* are as follows:

(1) The Put Option Agreement is invalid.

(2) The plaintiff failed to complete the Put Option Agreement.

(3) The plaintiff is not entitled to specific performance.

(4) The plaintiff suffered no damage as the plaintiff never owned the Options Shares.

Issues To Be Tried

As I see it the following are the main issues to be tried:

(1) Whether the Put Option Period was between 1 November 1997 and 2 May 1998.

(2) Whether the defendant agreed to purchase all the Option Shares at the price of RM8,852,250 if the option was exercised by the plaintiff.

(3) Whether the plaintiff issued the Completion Notice dated 29 April 1998.

(4) Whether the Put Option Agreement is valid in law.

(5) Whether the plaintiff is entitled to specific performance of the Put Option Agreement.

Findings Of The Court

As regards whether the option period was between 1 November 1997 and 2 May 1998 the term "put option period" is clearly defined and set out in the Put Option Agreement. Clause 1 of the Put Option Agreement defines the "Put Option Period" to mean the period commencing from the date of this agreement (inclusive) (ie, 1 November 1997) and expiring on 2 May 1998. The defendant himself admitted, in cross-examination, that the Put Option Period was from 1 November 1997 to 2 May 1998.

On the issue of whether the defendant agreed to purchase all the option shares at the price of RM8,852,250 if the option was exercised by the plaintiff, it is my finding that under the Put Option Agreement the defendant was to purchase all the 550,000 UCI shares. The relevant terms of the Put Option Agreement on this point are cls. 1, 2.1 and 4.3 of the said agreement.

It is settled law, that where there is a formal written agreement between the parties, they are bound by the terms contained in the said agreement, and no extraneous or extrinsic evidence should be led or considered to say that the agreement is not complete or that the agreement does not provide for what it sets out. (See ss. 91, 92 and 94 of the Evidence Act 1950). I am of the view that whether the Put Option Period was between 1 November 1997 and 2 May 1998 and whether the defendant agreed to purchase all the Option Shares at the price of RM8,852,250 if the option was exercised by the plaintiff, are questions which are clearly answered by the terms of the Put Option Agreement itself. The defendant cannot lead this court to consider any extrinsic or extraneous evidence to the contrary.

Whether The Plaintiff Issued The Completion Notice Dated 29 April 1998

It is my finding that the plaintiff had duly issued the Completion Notice dated 29 April 1998 on the defendant. Under cl. 1 of the agreement "Completion Notice" means the written notice to be given by the plaintiff to the defendant upon exercising the put option, the form which is set forth in the Schedule thereto.

Clause 4.1 of the agreement states as follows:

> The Put Option may be exercised by MBf (the plaintiff) by MBf serving the Completion Notice at any time during the Put Option Period. The Completion Notice shall:
>
> (a) be in writing and substantially in the form set out in the Schedule hereto; and
>
> (b) be delivered to Eng Poh Hong (the defendant) in accordance with clause 6.5.

Clause 5 of the agreement provides as follows:

> Except in the case of the Completion Notice which shall be sent or delivered by hand to the address of Eng Poh Hong as herein stated and which shall be treated as having been served on the date of actual delivery, all notices, requests, or after communication ... shall be deemed to have been given, in the case of notice by letter five (5) Business Days after the same is sent by registered post ...

The address of Eng Poh Hong (the defendant) as stated in the Put Option Agreement was No. 3, Jalan SS 2/59, 47300 Petaling Jaya. The plaintiff has through the evidence of Lim Yoke Wah (PW1) shown that the said Completion Notice dated 29 April 1998 was duly served on the defendant. The following are *inter alia* the relevant facts stated by PW1:

(i) The plaintiff exercised its right to sell all the UCI Option Shares to the defendant within the Put Option Period.

(ii) The plaintiff issued the Completion Notice dated 29 April 1998 (which is within the Put Option Period).

(iii) He signed the Completion Notice on behalf of the plaintiff.

(iv) To prevent any dispute on the use of the Completion Notice when the plaintiff wanted to exercise the right to sell, the entire format and words of the Completion Notice was agreed upon by both parties. All the plaintiff had to do, when issuing the Completion Notice, was to sign and date it.

(v) Even though the Completion Notice was not intended to be signed in blank by the defendant, the defendant signed it of his own accord, at the time that he signed and initialed every page of the Put Option Agreement. The defendant probably signed it to show his agreement and acceptance of the format and words of the Completion Notice.

(vi) He had sent the Completion Notice himself to the defendant. He sent it by hand on 29 April 1998 (the date on the Completion Notice) to the defendant's address as stated in the Put Option Agreement ie, No. 3, Jalan SS 2/59, 47300 Petaling Jaya. He had placed the Completion Notice in the defendant's post box at that address.

PW1 in cross-examination denied that the Completion Notice dated 29 April 1998 was given to the defendant personally at a coffee house. He testified that it is his practice as the general manager of the plaintiff company to serve documents on clients. In this case, he personally served the two Completion Notices on the defendant at the defendant's address.

The defendant has alleged that the Completion Notice was given to him at a coffee shop and outside the Put Option Period. I find this allegation is unsubstantiated and uncorroborated. On this issue it is between PW1's word against the defendant's word. It is my finding it is unlikely that PW1 as a general manager of the plaintiff company who handles all matters pertaining to Put Option Agreements would overlook the Put Option Period and issue the Completion Notice outside the Put Option Period. This would be highly improbable. On the balance of probabilities, I find that the version of the facts as stated by PW1 is to be believed and not that of the defendant.

Estoppel

I am of the view based on the facts and circumstances of this case the doctrine of estoppel as raised by the plaintiff would apply in favour of the plaintiff against the defendant. (See the case of *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 4 CLJ 283).

Applying the law of estoppel to the facts of this case, I find that the defendant signed the Put Option Agreement. He agreed to all its terms. He agreed to the prescribed Completion Notice. During the Put Option Period, the plaintiff through Lim Yoke Wah (PW1) issued the Completion Notice and delivered it to the defendant's address as stated in the Put Option Agreement. The defendant confirmed it was the correct address and that he still currently resides at the address. He confirmed receiving the Completion Notice. He, then, because he could not pay the Put Option Purchase Price, negotiated with the plaintiff to settle his contractual debt. He asked for indulgence. He asked for an extension of time. He attempted to obtain a loan to settle the put option debt. He never, until the trial of these two cases, objected or protested against the issuance of the Completion Notice on him. He never raised the issue of the Completion Notice being issued outside the Put Option Period (which is denied and refuted by the plaintiff) until the trial. He led the plaintiff into believing that the Completion Notices were issued to him properly and within the Put Option Period. Both parties proceeded, particularly in the negotiations to settle, on the basis that the plaintiff exercised the put option properly by issuing the Completion Notices within the Put Option Period.

Whether The Put Option Agreement Is Valid In Law

I find that the Put Option Agreement, as a contract, is valid and enforceable. There is no ground upon which that contract can be made void. The evidence shows that the defendant acknowledged and accepted the Put Option Agreements as valid contracts between him and the plaintiff.. The statement of agreed facts states that the Put Option Agreements were signed by both parties and that the defendant failed to pay the Put Option Purchase Price (RM8,852,250). If the defendant is alleging that the Put Option Agreement are not valid in law the burden is on him to prove this assertion.

Whether The Plaintiff Is Entitled To Specific Performance Of The Put Option Agreement

Specific performance is a term of the Put Option Agreement. Specific performance is provided for in the Put Option Agreements for both parties. It is provided for in cls. 5.1 and 5.2 of the Put Option Agreements.

The enforcement of a contract by specific performance is a matter for the discretion of the court. The Put Option Agreement was a contract freely agreed to between the plaintiff and the defendant. It was established in evidence that both parties stood to benefit from the contract. The plaintiff gets to sell the Option Shares at a specific price and the defendant gets to own the Option Shares at a later point in time at a pre-determined price. He also gets to control or maintain his shareholding interest in the company UCI.

The jurisdiction to allow specific performance or the remedy of damages, either in addition to, or in substitution for specific performance, is found in s. 18 of the Specific Relief Act 1950 which states as follows:

> 18 (1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance.
>
> (2) If any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

It is my finding that in this case the Put Option Agreement was freely entered into. The terms of the contract are clear. The objective or purpose of the contract is clear. The intention of both parties is clear. Specific performance is provided for and set out in the contract. In *lieu* of specific performance, an alternative remedy is provided for in the form of the sale of the shares in the open market and for the defendant to bear the shortfall (which clearly is to give the remedy of damages to the plaintiff).

The defendant has claimed that the plaintiff is not entitled to specific performance of the Put Option Agreement due to the fact that a letter was sent on 14 July 1998 deeming that the Put Option Agreement was terminated if the defendant failed to comply with the Completion Notice within five days of the receipt of the letter. On this point I find however it has been established that the defendant made several attempts to settle the purchase price by seeking to carry out purchase of the Option Shares between January 1998 up to July 1999. PW1 in his evidence for the plaintiff's case on this issue had this to say *inter alia*:

(i) There was an attempt by the defendant to settle the purchase price by offering security in the form of a plot of land in Gua Musang, Kelantan;

(ii) After the proposal failed to materialise, the defendant wrote a letter requesting time to settle the purchase price pending a meeting with a financial institution in Switzerland;

(iii) When a settlement failed to materialise, there were further attempts to settle which involved Sateras Resources (M) Berhad which led to the drafting of the two draft settlement agreements which were not executed.

I further find that the defendant himself agreed under cross-examination that he wanted to settle the matter with the plaintiff. These attempts made by the defendant clearly show that at all material times, the defendant was seeking to settle the share purchase price in accordance with the terms of the Put Option

Agreement and that the plaintiff was negotiating the settlement with the defendant. The parties' actions clearly show that they had treated the Put Option Agreement as subsisting and not terminated. The defendant should be estopped from now claiming that plaintiff is debarred from claiming specific performance of the Put Option Agreement when the defendant himself has treated the Put Option Agreement as valid and ongoing.

The defendant had relied on cases whereby claims for specific performance were not enforceable due to the contract being terminated. However I find the cases of *Lim Ah Moi v. AMS Periasamy a/l Suppiah Pillay* [1997] 3 CLJ 629, *Vine v. National Dock Labor Board* [1956] 1 All ER 1 and *Johnson v. Agnew* [1997] 1 All ER 883 cited by the defendant are distinguishable from the present case. In those cited cases, the plaintiff had taken immediate steps to terminate the contracts and no attempts were made by the parties to carry out the terms of the contracts after the act of termination. In each of these cases, the termination of the contract was clear and immediate.

The defendant had contended that the plaintiff does not have a right to specific performance as it is seeking monetary compensation. In his claim that specific performance is prohibited if monetary compensation is an adequate relief, the defendant has relied on the case of *Arab Malaysia Corp Builders Sdn. Bhd. & Anor. v. ASM Development Sdn. Bhd.* [1998] 6 MLJ 136. In this case, the plaintiff was seeking an interlocutory injunction to restrain the defendant from deducting liquidated and ascertained damages from sums due to the plaintiff. It was found by the learned judge that a claim for money was not specifically enforceable. I find that the said case is distinguishable from the present case as in the said case, the plaintiff was seeking to obtain an injunction against the removal of damages which they were claiming against the defendant. However, in the present case, the plaintiff is not merely seeking to specifically enforce the payment of the contract sum but rather to specifically enforce the contract ie, for the defendant to complete the sale and purchase of the Option Shares for the price as stipulated in the Put Option Agreement. The plaintiff is entitled to specific performance of the contract as stipulated by the terms of the Put Option Agreement and should not be prevented from claiming the same merely because the enforcement of the contract amounts to a payment of money.

The defendant has also alleged that the plaintiff was not ready and willing to perform its obligations under the Put Option Agreement because of the following reasons:

(i) The plaintiff did not show that they possessed the shares at the time the agreement was entered into;

(ii) The plaintiff did not show that they possessed shares when completion notice was issued;

(iii) The plaintiff allegedly disposed of some of the shares.

Contrary to the contention of the defendant, it is my finding that the plaintiff has at all times been ready and willing to perform its obligations and it has at all times carried out its obligations under the Put Option Agreement. The defendant has sought to raise the issue that the shares were not in the plaintiff's possession at the material time. The evidence does not conclude this at all. PW1 and PW2 have merely given evidence that they were both not involved in the buying of the shares and as such they could not confirm when the shares were bought nor at what price. At no point in time was it established through the witnesses that the plaintiff was not in the possession of the shares at the material times. It is my view that there is no burden on the plaintiff to prove that the shares were acquired before the Completion Notice was issued. The possession of the shares by the plaintiff at the material time was not an issue to be tried in this matter. The defendant has in fact failed to discharge his burden in proving his defence that the plaintiff was not ready and willing to carry out its obligations by showing that the plaintiff was not in the possession of the shares at the material time. Further, the defendant's actions in attempting to settle the share purchase price with the plaintiff is inconsistent with his allegations that he had knowledge that the plaintiff was not in possession of the Option Shares.

It has also never been established in evidence that the plaintiff disposed of any of the shares. The defendant relies on an inference from a letter dated 14 September 1998 that the plaintiff had commenced selling the shares. I find this inference unfounded. The defendant has also sought to urge the court to form an adverse inference against the plaintiff pursuant to s. 114(g) of the Evidence Act 1950 against the failure to produce the documentary evidence to prove that they were in possession of the Option Shares. It is my view that s. 114(g) of the Evidence Act 1950 is not applicable in this respect. There is no adverse inference to be drawn as there is nothing to show that any available evidence was withheld from this court. In making this assertion, the defendant has a burden to show that there was any such evidence that could have been produced which was withheld by the plaintiff. However the burden was not discharged by the defendant.

The defendant has raised on an issue that the plaintiff cannot claim for damages for breach of contract in substitution to specific performance. On this issue I find that cl. 5.2 of the Put Option Agreement clearly states that in the event of a breach of the terms by the defendant, the plaintiff is entitled to specific performance or for the right to sell or dispose of the Option Shares, and that

if the total amount realised by the plaintiff on the sale for the Option Shares is insufficient to satisfy the Put Option Purchase Price, then the remedy for the shortfall of the price of the shares in comparison to the Share Purchase price is available to the plaintiff. The plaintiff should therefore not be prevented from claiming for either relief as this is their contractual right under the agreement.

Duress

The defendant has alleged that PW2 pressured the defendant into making an admission of the debt and that the defendant entered into negotiation for settlement under duress. However I find the defendant has failed to establish this allegation through evidence. The evidence clearly shows that the defendant agreed that he wanted to settle the matter and was at no point in time, under any duress by the plaintiff.

Misrepresentation

The defendant has also alleged that there was a misrepresentation by the plaintiff that the plaintiff had the said Option Shares. This allegation is completely unfounded. I find that the defendant has not in any way established that the shares were not in the plaintiff's possession at the material times.

Conclusion

Having evaluated the evidence of the witnesses called by both the plaintiff and the defendant and having studied the documentary evidence tendered in this case, it is my finding that the plaintiff has proved on a balance of probabilities its case against the defendant. I hereby allow the plaintiff's claim with costs and grant the orders as prayed for wherein a judgment for the specific performance of the Put Option Agreement is entered against the defendant. The defendant is to pay the plaintiff a sum of RM8,852,250 in the case of D3-22-3155-98 for the said Option Shares.

As I have allowed the plaintiff's claim against the defendant in the case of D3-22-3155-98.1 also hereby allow with costs for the same reasons the plaintiff's claim against the defendant in the case of D3-22-3156-98. The defendant is to pay the plaintiff a sum of RM5,559,000 for the said Option Shares as a judgment for the specific performance of the Put Option Agreement.